Response:

Part 9553.0020, subpart 24.

Ms. Kathleen Pine expressed concern that historical operating cost base lags the rate year thus causing the CPI-U to not be reflective of the operating costs to be incurred. The Department believes that the annualization of the CPI-U compensates providers for the time lag between the reporting year and the rate year. For example, if the CPI-U were 6%, the factor used to update the historical operating costs would be 10.77%. The Department desires to retain the proposed language as published.

Part 9553.0060, subpart 3, item H.

Ms. Pine also believes the Department's amendment to this provision to express the investment in land costs incurred prior to January 1, 1984 as being $1,000 per licensed bed, is a significant change. The Department disagrees because the prior permanent rule 52 (12 MCAR s 2.052) was the rule to which the statement "limited according to the laws and rules effective on December 31, 1983" referred. The specific cite in that rule is 12 MCAR s 2.052 D.5.b(1)(a). The Department believes that the amendment proposed at the public hearing is a clarification and desires to retain the language as amended.

COMMENT 62. Mr. Louis Furlong, Attorney-at-Law, commented on several provisions of the rule. All of Mr. Furlong's comments have been addressed in other comments or in the Department's Statement of Need and Reasonableness. However, Mr. Furlong raises two issues regarding ARRM's participation in the Advisory Group and the Department's compliance with Chapter 14 which require further clarification.

Response: As indicated in the Department of Human Services Exhibit D, Ms. Mary Martin was the ARRM appointed representative in that group. Additionally, Cliff Fox, Sharon Kannenberg, and Georgine Busch represent facilities which are ARRM members.

Mr. Furlong also makes several inaccurate statements regarding the process employed by the Department in seeking public participation during the drafting process and desires to address these inaccurate statements in the following manner:

(1) The 4-29-85 draft was not mailed to all providers. On April 12, 1985, a one page memorandum was sent to all providers indicating that a draft of the rule was available upon request and that any comments received by the Department would be considered "in completing the final draft of the rule". Many providers did request and were sent the rule.

(2) We received comments from 11 persons or organizations. Contrary to Mr. Furlong's opinion, the commentors raised many concerns including issues such as the establishment of limits by geographic groups, funded depreciation, agreements with Minnesota Housing Finance Agency, top management limits, useful life of capital assets and general reporting requirements. The Department considered all of these comments and made changes, as appropriate. The major change was the elimination of geographic groups for purposes of establishing limits on operating costs. This change was made because the Department was persuaded by the comments that such ranking and

comparisons among facilities would be inequitable until the Department develops a system of reimbursement which is based on the mix of resident needs in each facility.

(3) The Department held periodic meetings with the Advisory Group and informally met or talked to different providers throughout the rulemaking process. However, the Department is unaware of any public meeting, other than the Advisory Group meetings held to discuss this draft.

(4) On July 17, 1985, the Department sent a Notice of Hearing informing all providers that the proposed rule was available upon request and giving all pertinent information regarding the hearing and availability of the SNR.

The Department believes that the process employed is consistent with the requirements of M.S. s 14.01 to 14.38. Additionally, the Department made considerable effort to allow public input beyond that which is specified in statute. The process of drafting a rule involves the production of many drafts. Drafts are circulated to secure input from interested parties so that future drafts, if appropriate, can be changed.

COMMENT 63. ARRM has submitted a complete alternative rule along with a Statement of Need and Reasonableness.

Response: The Department has reviewed this rule and SNR and submits initially that to the extent the ARRM rule conflicts with the Department's proposed rule, adoption of the ARRM rule may result in substantial change and therefore cannot be adopted. The ARRM rule incorporates the suggestions and criticisms made by ARRM members at the public hearing. The Department has already addressed these comments and criticisms in its comments submitted to the Administrative Law Judge at the end of the 20-day comment period.

By proposing this rule, ARRM loses sight of the fact that "regulatory agencies do not establish rules of conduct to last forever," (citation omitted) and that an agency must be given ample latitude to "adopt their rules and policies to the demands of changing circumstances." Motor Vehicle Mfrs. Assn. v. State Farm Mutual, 103 S.Ct. 2856, 2866 (1983).

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The latitude allowed the agency is reflected by the standard which the Administrative Procedure Act directs the Administrative Law Judge to apply in reviewing a proposed rule. It is required that the agency make an affirmative showing establishing the need for and reasonableness of the proposed rule (Minn. Stat. 14.14, subd. 2). The Administrative Law Judge is not obliged or required to weigh the proposals in the ARRM rule against the proposals in the Department rule to determine which is more reasonable. It is the Department which possesses the legislative mandate to promulgate a reimbursement rule. It is the Department which is irrebutably presumed to possess the authority and expertise to develop the rule. Accordingly, whether a given public comment or a proposed rule provision offers an alternative that may be as reasonable (or even more reasonable) than the Department's is not the issue.

To the extent that the Department has reviewed the proposed ARRM rule, the Department has determined that several provisions of this rule would result in substantial increases in expenditures in violation of the cost containment directives in the enabling legislation. For example, just the change of divisor from "resident days" to "93% licensed capacity days" (page 39 of ARRM rule) to compute the operating cost payment rate would increase expenditures in the Medical Assistance program by approximately $4,000,000.

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The proposed operating cost adjustment allowance (page 41 - ARRM rule) which involves the addition of .30 cents per day and is not connected by any cost incurred by the facility, would result in an increase of over $500,000 in Medical Assistance expenditures. Other changes proposed by ARRM in property related reimbursement, in elimination of cost limits, and in provisions regarding transactions between related organizations, would produce even more dramatic increases in Medical Assistance expenditures.

These increases in Medical Assistance expenditures are not only contrary to the legislative mandate, but would also have the effect of jeopardizing the waivered services program as explained on page 4 of the Department's SNR.

Most of the arguments presented in the ARRM's SNR have been already addressed by the Department. However, there are two new issues raised that the Department feels need further clarification. First, in the Scope section, ARRM claims that the Department is impermissibly, retroactively applying the proposed rule. They recommend that 1986 be used as a base year so that the first rates set under the proposed rule be the rates set for October 1, 1987. The Department believes that its proposed rule is not retroactive since no payment rate shall be established under that rule until after January 1, 1986 which is after the effective date of the rule. The fact that the proposed rule uses as a historical base 1985 costs only shows that we have a continuous prospective reimbursement system.

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ARRM's SNR (Part 9553.0050, point 4) alleges that the Department's formula for apportioning operating cost payment rates is algebraically incorrect. The Department believes that the provision in its proposed rule, as amended (Part 9553.0050, subpart 1, item A, subitem 2) is mathematically correct.

The provision, can be stated as follows:

$$\frac{\text{Program Operating Costs}^1}{\text{Total Operating Costs}^2} \times \text{Total Operating Cost Payment Rate}^3 = \text{Program Operating Cost Payment Rate}$$

1. After allocation/reclassification of such costs as payroll taxes and fringe benefits.
2. After reclassification of Special Operating Costs and Central Office property Related Costs.
3. After adjustment for reclassification in number 2.

The Department believes that it has established that its proposed rule as amended is necessary and reasonable and respectfully requests that the administrative law judge recommend the adoption of the Department's proposed rule as amended.

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STATE OF MINNESOTA
DEPARTMENT OF HUMAN SERVICES
444 LAFAYETTE ROAD
ST. PAUL, MINNESOTA 55101

November 15, 1985

Mr. George Beck
Administrative Law Judge
Office of Administrative Hearings
400 Summit Bank Building
310 So. 4th Ave.
Minneapolis, MN 55415

Dear Judge Beck:

I am forwarding a Revisor certified copy of the revised rule parts 9553.0010 to 9553.0080, and the Department of Human Services Finding of Facts and Conclusions, for your approval. The page and line numbers referenced in the Finding of Facts are keyed to the July 1, 1985 draft of the rule which Judge Lunde used in writing his report. I have also included a copy of the rule as proposed in the State Register.

A draft version of this material was given to Judge Lunde on Friday, November 8, 1985 as he requested. Only minor technical amendments have been made since the draft was submitted to Judge Lunde. These amendments are listed on page 14 of the Findings of Fact and Conclusions. Since we must submit the permanent rule to the State Register by November 21, 1985 if it is to be effective before the temporary rule expires, your approval by November 19, 1985 would be most appreciated.

Please call me if you need any further information. My telephone number is 297-3463.

Thank you.

Sincerely,

Charles V. Osell

Charles Osell, Supervisor
Rule Administration and
Policy Development
Long Term Care Management Division

CO/lmw
Enclosure

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OFFICIAL

STATE OF MINNESOTA

DEPARTMENT OF HUMAN SERVICES

IN THE MATTER OF THE PROPOSED ADOPTION OF DEPARTMENT OF HUMAN SERVICES RULES RELATING TO DETERMINATION OF PAYMENT RATES FOR INTERMEDIATE CARE FACILITIES FOR PERSONS WITH MENTAL RETARDATION PARTICIPATING IN THE MEDICAL ASSISTANCE PROGRAM, PARTS 9553.0010 to 9553.0080

ORDER ADOPTING RULES

The above-entitled matter came on for hearing before Administrative Law Judge Jon Lunde on the 21st, 22nd, and 23rd days of August, 1985, commencing at 9:00 a.m. on August 21st in the State Office Building, Room 200, St. Paul, Minnesota, after proper notice required by Minnesota Statutes, section 14.14 was served upon all persons, associations, and other interested groups registered with the State Department of Human Services for that purpose.

After affording interested persons an opportunity to present written and oral data, statements, and arguments, hearing all of the testimony, considering all of the evidence adduced and upon the records, files, and proceedings herein and applicable statutory standards or criteria, and confirming the need for and reasonableness of the above-captioned rules.

NOW, THEREFORE, IT IS ORDERED that these rules identified as Payment Rates for Intermediate Care Facilities for Persons with Mental Retardation Licensed Under Minnesota Statutes, Chapter 144 Participating in the Medical Assistance Program are adopted this 15th day of November, 1985, pursuant to the authority vested in me by Minnesota Statutes, section 256B.501.

STATE OF MINNESOTA

Commissioner of Human Services

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OFFICIAL

STATE OF MINNESOTA
DEPARTMENT OF HUMAN SERVICES

In the Matter of the Proposed Adoption of Department of Human Service Rules Relating to Determination of Payment Rates for Intermediate Care Facilities for Persons with Mental Retardation Participating in the Medical Assistance Program, Parts 9553.0010 to 9553.0080

FINDINGS OF FACT AND CONCLUSIONS

The above entitled matter came before Administrative Law Judge Jon L. Lunde at 9:00 a.m. on August 21, 22, and 23, 1985, at the State Office Building, Room 200, St. Paul, Minnesota, after proper notice required by Minnesota Statutes, section 14.22 was served on all persons, associations, and other interested groups registered with the State Department of Human Services for that purpose.

After affording interested persons an opportunity to present written and oral data, statements, and arguments, having heard all the testimony, having considered all the evidence addressed upon the records, files, and proceedings herein, the Department accepts and incorporates the Findings of Fact of the Administrative Law Judge Jon Lunde, in this matter. With respect to the defects identified by Judge Lunde and Chief Administrative Law Judge Duane Harves, I find the following:

9553.0020, subpart 5, Capital assets.

12. The Department accepts the suggestions of Judge Lunde that part 9553.0020, subpart 5, be modified by making the following amendment: On page 1, line 30: insert the words "capitalized improvement and repairs," after "leasehold improvements,".

9553.0020, subpart 25*, Indirect costs.

19. The Department considered Judge Lunde's recommendation for modification of this definition and desires to retain the language as proposed. Even if a cost is directly identifiable, it may not be easily identified. Examples are pencils, staples, and paper clips. Administrative costs of directly identifying such items far exceeds the benefits.

*Judge Lunde's report mistakenly identified "indirect costs" as subp. 24. It is subp. 25.

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